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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT JUNEAU**

MYRNA I. JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	
)	
FRED MEYER STORES, INC.,)	
)	
Defendant.)	J-04-008 CV (RRB)
)	

PLAINTIFF'S OPPOSITION TO DEFENDANT FRED MEYER'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant has requested that this Court disregard the jury verdict in this matter and enter judgment as a matter of law. In making this argument, Defendant recycles once again its legal arguments that have been considered and rejected by this Court repeatedly over the course of this litigation. This Court can summarily reject Defendant's improper attempt to reargue the law of the case and to mischaracterize the underlying evidence. Defendant's Motion for Judgment as a Matter of Law should be denied.

I. The Law Of The Case Is That Plaintiff Could Bring a Claim For Breach Of The Subjective Prong Of The Covenant Of Good Faith And Fair Dealing.

This Court in its Order Re: Law of the Case at Docket 163 restated its prior finding(s) that Plaintiff could bring a claim for breach of the covenant of good faith and fair dealing on the subjective prong. Specifically, this Court held that an employer who terminates an

1 employee in order to replace her with someone whom he has a “hoped-for” romantic interest,
2 has acted in bad faith. This was the Court’s Order on the law of the case. This was the “Rule”
3 given to the jury. The jury had no difficulty in concluding that this conduct occurred and that it
4 was wrongful.

5 Defendant raises no new arguments on this decided legal issue. Neither the Court nor
6 counsel for Plaintiff should have to repeat these arguments again. Counsel for the Defendant
7 simply doesn’t get it. He can make these arguments to the 9th Circuit. The record has been
8 made *ad nauseum*. Nothing further needs to be done by this Court other than to refer to its prior
9 Order(s) and once again reject Defendant’s claim that the firing of an employee under these
10 circumstances is *not* in breach of the covenant of good faith and fair dealing.

11 II. Defendant Has Always Had Notice That Plaintiff Claimed She Was Wrongfully
12 Terminated Or Alternatively Constructively Discharged.

13 Defendant’s second argument has also been repeatedly rejected by this Court.
14 Defendant argues that it had no notice that Plaintiff claimed she was wrongfully terminated.
15 Instead, Defendant argues that it was only on notice of a “constructive discharge” claim. This
16 argument is simply incorrect. A quick review of some of Defendant’s own pleadings confirms
17 that it has known and addressed the wrongful discharge claim *and* the alternative constructive
18 discharge claim.

19 Defendant’s Motion for Summary Judgment, filed on July 31, 2006 at Docket 45,
20 described Plaintiff’s claim for wrongful discharge as follows:

21 “Plaintiff alleges in her complaint that the defendants breached a common law covenant
22 ‘by terminating plaintiff when she left work because she was emotionally distraught
23 over defendant’s unlawful discriminatory, harassing, and retaliatory conduct towards
24 her....”¹

26 ¹ At page 25.

1 In Defendant's Motion to Dismiss, dated July 20, 2007 at Docket 86, Defendant
2 recognized that Plaintiff had claims for both wrongful discharge and constructive discharge.

3 "Consider the following necessary elements to the wrongful termination in breach of
4 covenant claim. First, was there a termination? No, because plaintiff walked off the job
5 when she knew that waling off the job would be considered *her* voluntary resignation.
Second, even if there was a termination by Fred Meyer, was it "wrongful"?²

6 Defendant erroneously states that in Plaintiff's Trial Brief, filed September 17, 2007 at
7 Docket 103, "the *only* theory of termination was constructive discharge."³ However, if one
8 looks at the Trial Brief, it is clear that Plaintiff claimed she was terminated from her
9 employment and did not "voluntarily" walk-off. In that same brief, Plaintiff also advances the
10 alternate theory of constructive discharge.⁴

11 Defendant's argument that it was surprised and unready for Plaintiff's wrongful
12 discharge claim is simply belied by its own pleadings and even the most cursory review of the
13 record. The Court should reject this argument was well.

14 III. A Reasonable Jury Did Find that Plaintiff Was Terminated By The Actions Of
15 Her Supervisor.

16 Defendant next argues that "no reasonable jury could find that plaintiff's supervisor
17 terminated her to hire someone in whom he had a romantic interest." First, it is clear from the
18 verdict in this matter that this is exactly what the jury found. Defendant then takes another tack
19 in challenging the jury's findings. It argues that because Mr. San Miguel didn't have the
20 authority to fire Plaintiff, the fact that she was fired by his supervisors, either Fred Sayre or
21 Mary Lucas, insulates the Defendant from a finding of breach of the covenant of good faith and
22 fair dealing.

23
24
25 ² At page 5.

26 ³ Motion for Judgment as a Matter of Law at page. 8

27 ⁴ Plaintiff's Trial Brief at pp. 10-12.

1 This argument fails for the obvious reason. Both Plaintiff *and* Defendant argued at trial
2 that San Miguel was working within the course and scope of his employment and that his
3 actions, if wrongful, could be imputed to the Defendant under the doctrine of *respondeat*
4 *superior*. Defendant never disassociated or attempted to disassociate itself from Mr. San
5 Miguel or his actions that led to the wrongful discharge of Plaintiff. Quite simply, Defendant
6 never claimed that the master/servant doctrine should not apply. It is too late to do so now.
7 The jury had more than enough evidence to conclude that San Miguel's conduct led to the
8 termination of Plaintiff, irrespective of who actually approved her firing.

9 Finally, Defendant's citation to *Kouvchinov v. Parametric Technology Corp.*,⁵ provides
10 no assistance in this matter. *Kouvchinov* was an ERISA case involving the claim of tort
11 damages from the wrongful denial of Short Term Disability (STD) benefits. It simply has no
12 relevance to this action and does not stand for the proposition set forth by the Defendant.

13 IV. Counsel's Closing Was Proper And Caused No Prejudice.

14 Defendant's remaining claim is that Plaintiff's counsel acted improperly in arguing that
15 "Fred Meyer is a big company and has lots of money."⁶ Any suggestion that Defendant is a
16 "big company" with "lots of money" was not new information to the jury. The relative size of
17 Defendant, its operations in multiple states with extensive infrastructure, training and
18 procedures, was all testified to by witnesses at trial. Therefore, there can be no claim that
19 merely describing Fred Meyer in that manner was prejudicial in itself.

20 More importantly, there was no request that Fred Meyer be punished or pay damages in
21 excess of those incurred by Plaintiff because of its size or relative wealth. In fact, Plaintiff's
22 damage claim was circumscribed by the dismissal of her tort claims. She could only ask for

23 _____
24 ⁵ ___F.3d___, 2008 WL 3191283 (1st Cir.2008)

25 ⁶ Counsel has no recollection of making such a statement but does recall Defendant's counsel improperly arguing
26 that Plaintiff's business closure was related to her felony charge – in explicit disregard of this Court's orders on
27 that matter.

1 past and future economic loss. It is apparent from the modest award in this matter that the jury
2 awarded Plaintiff every dollar of her past economic loss but absolutely none for the future. For
3 these reasons, not only was there no request to penalize Defendant in this matter because of its
4 relative size or financial strength, it simply didn't happen. Plaintiff's counsel's arguments were
5 appropriate and created no harm or prejudice to Defendant.

6 V. Conclusion.

7 Defendant Fred Meyer Stores, Inc.'s Motion for Judgment as a Matter of Law should be
8 denied. The Court correctly ruled on numerous occasions on the law of the case. Defendant
9 has always had notice that Plaintiff claimed she was wrongfully discharged and in the
10 alternative, constructively discharged. A reasonable jury could find that Jaime San Miguel's
11 actions caused the termination of Plaintiff. Finally, any comments at closing regarding the
12 Defendant's size and relevant wealth were not intended to prejudice Defendant and did not do
13 so.

14 DATED Monday, September 08, 2008, at Juneau, Alaska.

15 Respectfully submitted,
16 CHOATE LAW FIRM LLC

17
18 *s/Mark Choate*

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PROOF OF SERVICE

STATE OF ALASKA, FIRST JUDICIAL DISTRICT AT JUNEAU

I am employed in the City and Borough of Juneau, State of Alaska. I am over the age of 18 and not a party to the within action. My business address is 424 N. Franklin Street, Juneau, AK 99801.

On September 8, 2008, I served the foregoing document described as PLAINTIFF'S OPPOSITION TO DEFENDANT FRED MEYER'S MOTION FOR JUDGMENT AS A MATTER OF LAW, on the interested parties in this action by serving the original true copies, addressed as follows:

James Dickens
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☒ By electronic service through the court of record's electronic service system,

☐ (State) I declare under penalty of perjury under the laws of the State of Alaska that the foregoing is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on September 8, 2008 at Juneau, Alaska.

s/Mark Choate

CHOATE LAW FIRM, LLC